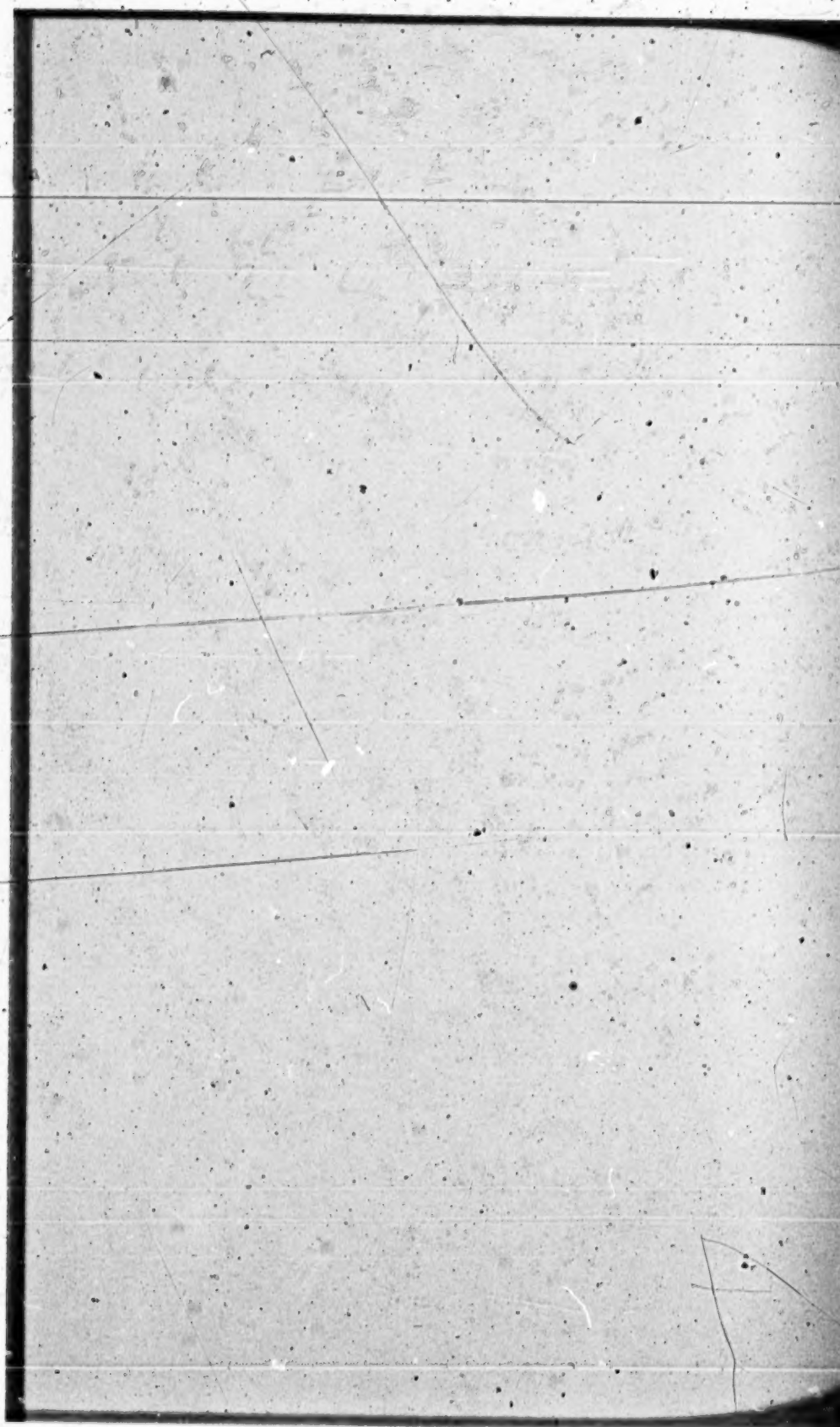

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 10 ORIGINAL.

STATE OF NEW JERSEY,

Plaintiff,

against

THE CITY OF NEW YORK,

Defendant.

BRIEF OF DEFENDANT IN REPLY TO PLAINTIFF'S BRIEF.

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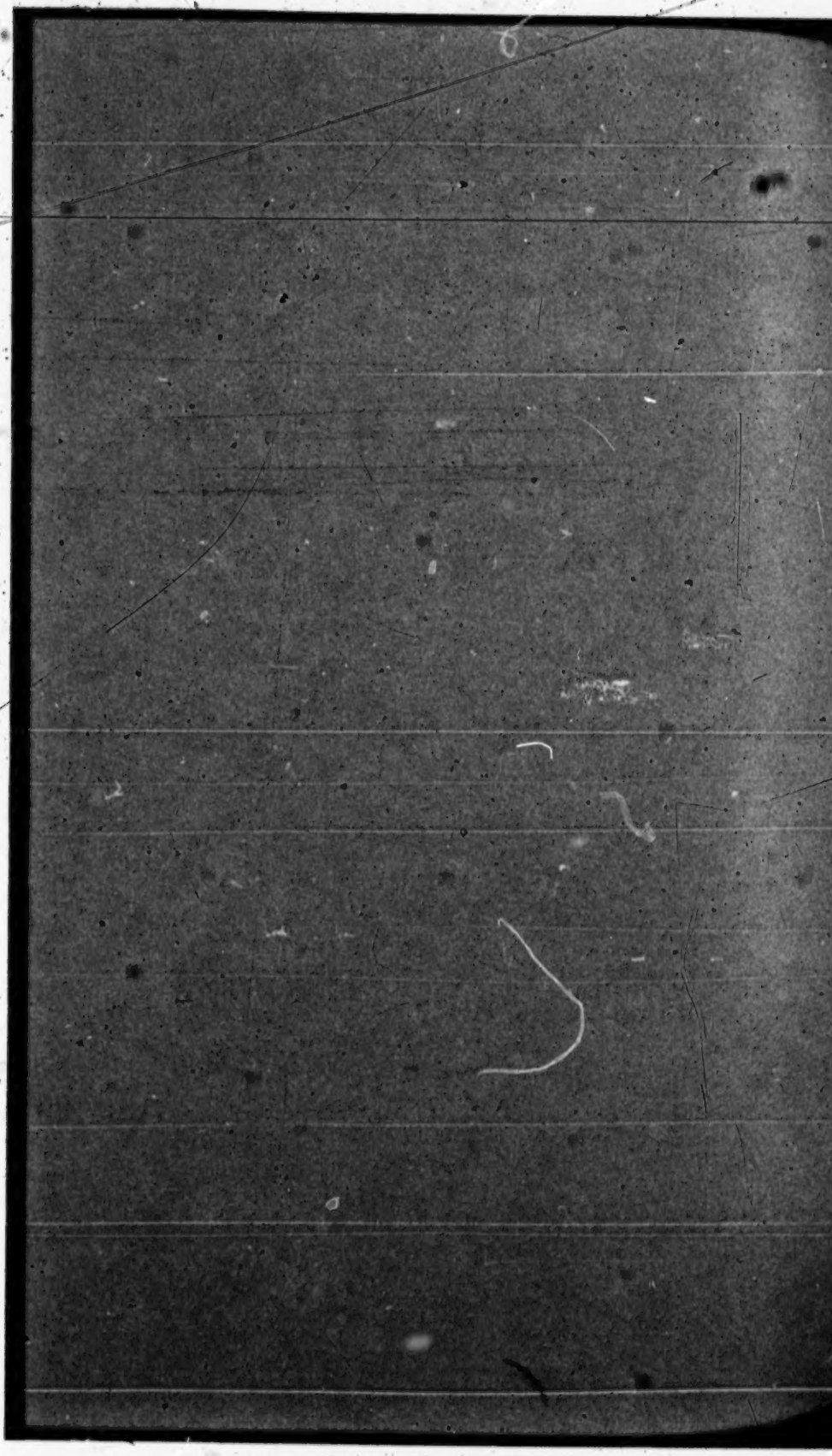

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 17, ORIGINAL.

STATE OF NEW JERSEY,
Plaintiff,
against
THE CITY OF NEW YORK,
Defendant.

BRIEF OF DEFENDANT IN REPLY TO PLAINTIFF'S BRIEF.

Statement.

Defendant's reply to plaintiff's brief in support of the report of the Special Master will follow the order of such brief, which in turn follows the order of defendant's exceptions to that report. Our points in this brief will, therefore, follow the group of headings or points of defendant's "argument".

(We are compelled, however, at the start to call attention and except to a statement in plaintiff's brief as to the claims of the defendant appearing in the first paragraph of page 2 of said brief. It is there stated—presumably referring to the amended answer—that it alleged "that this Court had no authority to enjoin such dumping because it was done on the 'high seas' ". *Defendant did not so contend.* The first defense in the amended answer alleged

that the garbage dumpings of the defendant were made in the Atlantic Ocean under permits from the Supervisor of New York Harbor, issued in accordance with the provisions of 25 Stats. 209, now Title 33, Chap. 9, Secs. 441, 443, 449, 451, U. S. Code, at points 8, 12 and 20 miles southeast of Scotland Lightship, and 10, 12½ and 22 miles distant from the shore of New Jersey, and that in view of such dumping on the high seas in the manner and at the points aforesaid this Court has no authority to enjoin defendant from dumping its garbage and refuse in the manner and at the places mentioned. The term "high seas" as is well known "includes waters on the sea coast without the boundaries of low water mark"—*In re Ross*, 140 U. S. 453, 471. It was, therefore, not because defendant's dumpings were made on the high seas solely, but because they were made in such seas more than a marine league from plaintiff's shores, that the jurisdiction of this Court was challenged in this case.)

ARGUMENT.

1.

Replying to plaintiff's argument that this Court has jurisdiction:

(a) Because the suit is one to protect the quasi-sovereign rights of the plaintiff:

Plaintiff introduced its contention by a quotation from *Kansas* vs. *Colorado*, 206 U. S. 46, at p. 85. Since plaintiff refers to that case as an authority favorable to it, we should like to quote from page 83 of the report the statement that:

> "* * * it (the judicial power) must be held to embrace all controversies of a justiciable nature

arising within the territorial limits of the Nation, no matter who may be parties thereto." (Italics those of the writer.)

A statement is then made in the brief (p. 5):

> "The principal issue raised by the pleadings is whether the acts complained of create a public nuisance on the lands and waters of the plaintiff."

Doubtless plaintiff would like to have the Court so consider the problems presented herein. However, a reading of our main brief should convince the Court that the above is a wholly incorrect interpretation of the issues or their importance. The principal issues are whether this Court has power to restrain defendant's acts in this case and whether, if it has such power, the plaintiff has proved the defendant guilty of causing the alleged nuisance.

Generally speaking, we do not argue that the plaintiff has not proprietary rights to the shore and in its territorial waters for a distance of three nautical miles from such shore; or that it has no right to sue in its character of *parens patriae,* if the proof of defendant's responsibility warrants it.

(b) Because the defendant is before the Court:

Plaintiff contends (p. 11) that because the defendant accepted the jurisdiction of the Court by not specifically raising the question in its original answer, and having thus accepted the same for more than a year "it cannot now raise the question". We will assume that anything said in a written argument in a case of the importance of the one at bar must be taken seriously even though its intrinsic importance may be doubted.

By way of reply, we say that in the first place, the Court allowed defendant to amend so as to specifically pre-

sent the question of jurisdiction over a strenuous similar objection by the plaintiff. In the second place, it is elemental that parties cannot confer jurisdiction by consent where questions pertaining to the subject matter of the controversy are involved.

> *State of Rhode Island* vs. *State of Massachusetts*, 12 Peters, 657, 720;
> *People* vs. *Central Railroad of New Jersey*, 42 N. Y., 283, 289 (Writ of Error dismissed 12 Wall. 455);
> *Ex parte, Schollenberger*, 96 U. S., 369, 377;
> *Ellenwood* vs. *Marietta Chair Co.*, 158 U. S., 105, 108.

Rhode Island vs. *Massachusetts, supra,* is such a landmark in the history of the power of this Court on the question of original jurisdiction in suits between states that we trust we will be pardoned if we quote from it at length.

This was an original suit in the Supreme Court brought by Rhode Island against Massachusetts to determine the boundary line between the two States at a certain point. The opinion of the Court was delivered by Mr. Justice Baldwin. In the course thereof it is said in respect to the powers and jurisdiction of this Court in reference to suits of this character (page 720):

> "But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed, is *coram non judice*, and its action a nullity; 10 Pet. 474; S. P. 4 Russ. 415. **And whether the want or excess power is objected by a party, or is apparent**

> **to the court, it must surcease its action, or proceed extrajudicially.** (Emphasis the writer's.) * * *
>
> Those States, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the Revolution, the prerogative of the crown, and the transcendent power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority, 6 Wheat. 651, 8 Wheat. 584, 88, adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more States. By the constitution, it was ordained that this judicial power, in cases where a State was a party, should be exercised by this court as one of original jurisdiction. The States waived their exemption from judicial power, 6 Wheat. 378, 80, as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the case specified."

On the question of the original power of this Court to deal with suits such as the present, between a state and a citizen of another state, we submit that what is said above is applicable in the instant case. In other words, this Court has the jurisdiction which the States in their capacity as sovereign nations, in adopting the Constitution, had to give to it. If the original States in interpreting the powers of their courts under the common law had no power to restrain a nuisance committed outside their boundaries, they could not give any such power to this Court to adjudicate the rights of the parties to litigations involving such

questions. That they did not have such powers is discussed in the cases set forth in our main brief from pages 28 to 33.

On page 11 of plaintiff's brief, it is also said that the contention of the defendant that this Court has no jurisdiction because of the fact that garbage dumpings are made more than three miles from New Jersey's shores is inconsistent with its contention that it dumps its garbage under permits authorized by Act of Congress of June 29, 1888 (25 Stats. 209), and that they cannot be legally united by the defendant.

It seems to us that it is a sufficient reply to this argument to quote Rule XXX of the United States Supreme Court Equity Rules which states that:

> "The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense."

Argument in this regard is also set forth at pages 68 and 69 of our main brief.

Whether permits are necessary to do such dumping as defendant does we do not know. Defendant has never taken the position that they were not. How far beyond the lines of New York Harbor, as laid down by the Secretary of the Treasury (*United States* v. *Newark Meadows Imp. Co.*, 173 Fed. 426, 428), the Supervisor's jurisdiction over dumping into the "adjacent waters" extends has never been established although it seems to have been held in one or more cases cited by the Special Master on pages 45-47 of his report that such jurisdiction extends beyond the three mile limit.

However, it does appear in this case that the Master did find that defendant had not violated the permits (unless

the finding on page 50 of his report that some garbage which remains on the scows after dumping is cleaned off as they "are being taken back from the dumping area" can be so interpreted. It is not so specified and we say it cannot be, in view of the finding on page 43 "that the dumping was by permission of the Supervisor of the Harbor".)

On page 12 of the brief plaintiff states that "Congress and the Supervisor of the Harbor have exercised", unchallenged by defendants since 1918, a sustained jurisdiction over the dumping grounds used "as navigable waters of the United States", and defendant cannot now challenge such jurisdiction, citing *Prigg* vs. *Pennsylvania,* 16 Peters, 539.

All this case holds on this subject is that an Act of Congress, which has been upheld by the decisions of various high State courts and by governmental officials, must after a long period of judicial and practical construction be considered valid (p. 621).

We ask, however, if plaintiff's contention is sound, why did not the Master make a specific finding to that effect as a matter of fact or law? Once again, we refer to *State of Rhode Island* vs. *State of Massachusetts, supra,* at page 729, where it is said, "that the boundaries of the United States were the external boundaries of the several states".

Plaintiff's argument really reinforces our own, namely, that the matter of dumping is within the regulation of Congress either under (possibly) 25 Stat. 209, as amended, or some provision yet to be enacted if thought necessary. Defendant has not been found to be violating 25 Stat. 209, as amended, and as yet there is no other appropriate legislation.

Other arguments on pages 12 and 13 of plaintiff's brief are sufficiently answered on pages 36-38 of our main brief,

except that we might add that in *Lefrois* vs. *County of Monroe,* 162 N. Y. 563, where it was held that the defendant could not be restrained at the suit of a neighboring farmer from permitting sewage to escape from its almshouse on to his farm, it was said that the alleged nuisance might be enjoined in an action against the Board of Supervisors of the County, and others in control of the building.

(c) The property affected is within the United States.

This subject is treated also at page 28 of our original brief (and *supra*), and nothing further need be added here.

2.

Replying to plaintiff's argument that defendant's garbage dumped more than a marine league from the New Jersey shore is driven by the winds upon plaintiff's beaches and into its adjacent waters, thus creating a public nuisance, to the great injury of plaintiff's rights and property.

On page 15 of its brief appear these statements:

> "The practice (of dumping its garbage and refuse at sea) was discontinued from that year (1896) until 1903 when it was resumed until 1906."

There are no references given as the source of this statement and no finding in accord therewith was made by the Master. Defendant's witness, Greene (Pr. A. 566-567), testified that the Barren Island Disposal Plant broke down in 1903 and for a short period of two or more months garbage had to be taken to sea. The abstract does make him state that "from 1906 to 1918 no garbage was sent to sea by

the City of New York". However, if the stenographer's minutes at page 1707 are consulted, it will be found that Greene's testimony was due to the form of question asked by City's counsel, as follows:

> "Q. So then from 1906 to 1918 was any garbage sent to sea by the City of New York? A. No, sir."

The Master, however, finds that the defendant "except for a brief period during 1906 did not dispose of these things at sea" (R. Sp. M., p. 19). It is immaterial whether the interruption was in 1903 or 1916. *But it is material that it did not extend for a three year period from 1903 to 1906, and nothing in the record justifies the statement in the brief.*

Taking up some of the statements in the brief in regard to the evidence, we find:

On page 27, it is stated that "Exhibits 16 to 24, both inclusive, show areas of garbage in mass and in process of distribution as it drifted toward the New Jersey shore (R. 15)." The words "New Jersey" do not appear in the printed abstract of testimony at the place referred to.

On page 28, it is said that:

> "Soap will not work on bathers who have been in that water (R. 16, 17)."

The printed abstract shows that these words should be preceded by the words "people remark". In other words, the statement is hearsay.

On page 29, it is stated that:

> "He (Smack) has followed the trail of garbage, which he has seen dumped in a definite line continuously to the beach, from approximately twenty miles southeast by east of Scotland Light."

and that he:

> "traced the course and direction for four and a half hours when the wind was blowing at the rate of thirty miles an hour (R. 24)."

In other words, if Smack followed this garbage in that way, it must have been moving about 4½ miles to 5¼ miles per hour (the Lightship being four miles from the shore—Pr. A., p. 24). Since the highest rate of drift of garbage as tested by Haas, plaintiff's witness, from the Harbor Supervisor's Office, was only slightly over a mile an hour with a 35 mile wind behind it, we submit that Smack's testimony, as well as that of the lobster men, on this subject was incredible and not to be interpreted as plaintiff and the Special Master have interpreted it. The correct construction is simply that they have gone through garbage all the way to the beach from the dumping grounds, but not that they have gone *along with* garbage that they saw dumped all the way to the beach (see also main brief, pp. 62 and 63).

From the bottom of page 32 to the middle of page 35 is a section of the brief relating to the testimony of fishermen, almost all of whom fished for lobsters. A majority of these men testified to having seen the scows dumped frequently, the reason therefor being because they often had their lobster pots set out near the dumping areas 18 to 20 miles off shore .(Voorhees, Pr. A., 36-37; Schweitzer, 42; De Camp, 47; Peterson, 50; C. Holgarson, 55; Oleson, 75; Popp, 347-348; Jacobson, 373). Now, although the Special Master made use of the testimony of these men as to following garbage from the dumping grounds to the shore (R. Sp. M., p. 26) he made no finding in respect to injury or damage to their lobster pots or to their business. Perhaps this was because one of them—Oleson—testified (Pr. A., 77):

> "I fished right around the dumping ground last year. That was the only place we could pick up a few lobsters * * *."

As it is a matter of common knowledge that lobsters are scavengers (Standard Dictionary "Lobsters"), the reason why the lobster-men fished on the dumping grounds is apparent. As to the damage they suffered, it often came from the dumping by scows of "heavy stuff" (cellar dirt, etc., Schweitzer, Pr. A., 46; Hines, 354; E. Phillips, 402). The testimony of this last witness should be examined with special care, as it is stated on page 33 of plaintiff's brief:

> "This garbage comes from New York City scows and is more or less a regular thing every day. This garbage affects lobster pots five or six miles inshore from the dumping ground (R. 402)."

Phillips actually testified in this regard (p. 402):

> "The way I put that distance is the inshore lightship there, [1239] the inshore lightship, which is supposed to be six miles from the beach. And I was directly south of him when he dumped on me. That is the subway dumping that I am talking about."

Surely it will not be contended that the dumping of subway material is the dumping of garbage, in view of the testimony of Anderson (Pr. A., 537) and Duggan (Pr. A., 546-547). We submit, therefore, that the summary is plaintiff's brief is misleading to say the least.

In view of the absence of a finding by the Master as to damage to lobster pots, we also submit that the statements on the bottom of page 33 and top of page 34, and middle of page 34, are out of place therein. The Master could not very well make a finding in regard to such damage in view of his finding (Report, p. 58) that, "The property affected is within the United States."

On page 34 it is stated:

> "Whenever the wind is from the east or northeast, it (garbage) drifts to the New Jersey shore. Their (lobster fishermen's) testimony positively identifies garbage on the beach and in the waters as having come from New York City scows dumped at sea."

There is no evidence in the record which justifies this conclusion of fact. If the word "toward" had been used instead of "to" in the sentence "it drifts to the New Jersey shore" it would not have been so objectionable. Several of the lobster fishermen witnesses so testified and two or three do testify that it drifted "to" the shore. In view of the testimony of Haas, however, heretofore referred to, we say that even such testimony cannot be relied upon (Main Brief, pp. 62-63).

As to the statements (Plaintiff's Brief, p. 34) in regard to diminishing returns to fishermen, we refer again to the testimony of Olsen above, and also to the fact that the pollution of coastal waters near important harbors by oil burning or oil carrying vessels and by refineries, has been a very serious menace to the fishing industry.

Plaintiff's Exhibit 258 is a transcript of the minutes of a meeting of the National Coast Anti-Pollution League, held in September, 1923. Set forth therein is a copy of a joint resolution adopted by Congress in the year 1922, authorizing the President to call a conference of marine nations with a view to the adoption of effective means for the prevention of the pollution of navigable waters by oil, etc., discharged from oil carrying or operated steamers. The preamble of such resolution, so set forth, contained the following provisions:

"WHEREAS, the careless casting of oil refuse into the sea from oil carrying steamers has become a serious menace to the maritime and fishing industries of the United States, and other countries, and * * *

WHEREAS, serious loss to ocean fisheries has resulted from such discharge into the territorial waters of waste products of oil used for fuel in many steamers in place of coal, which threatens to exterminate the food fish, oysters, clams, lobsters and other food supply, and

WHEREAS, the dumping of this oil refuse is not only ruining the bathing beaches situated in the territorial waters of the various countries which, during the summer, attract thousands and thousands of people to the seashore resorts, and the injury to seashore property is most alarming * * *"

The minutes of such meeting, as set forth in Exhibit 258, also show that several speakers at such conference emphasized the great injury which oil pollution was inflicting on bathing beaches and to bathers using them, and to the coastal fishing industry.

Evidently, as a result of the facts and representations made to Congress, that body, in 1924, passed an act, known as the "Oil Pollution Act" (43 Stat. 604), and set forth in Title 33, Chapter 9, Sections 431 to 437, inclusive, U. S. Code. The act prohibited the discharge, except under regulations prescribed by the Secretary of War, of oil, fuel oil, oil sludge, and oil refuse into or upon the coastal navigable waters of the United States, from vessels.

That the prohibitions provided by the statute were not wholly effective, however, is evidenced from the testimony of certain of the witnesses for the plaintiff in this case. Frank Durand, Mayor of Sea Girt (Pr. A. 164) testified

that there had been complaints from people there (Pr. A. 171) of oil and tar in the water which got on the feet of bathers but in the last two or three years it had not been serious. Edmund R. Willets, a summer resident of Sea Girt testified (Pr. A. 203) "I have seen oil come in on the beach at Sea Girt * * * more like tar than oil" (Pr. A. 204). Joseph C. Hoagland, a real estate man from New York who spends his summers at Rumson, New Jersey (Pr. A. 520) testified (Pr. A. 523) "we have had an oily deposit that we described, perhaps not technically correctly, as 'tar' on the beach. It is a crude oil deposit."

Perhaps, too, the dumping of Newark, N. J. sewer sludge at the 8 mile point southeast of Scotland Light has something to do with the alleged injury to fishing (Pr. A. 537, 545).

As to whether the garbage is getting worse every year (Plaintiff's Brief, pp. 34-36) although many of plaintiff's witnesses have so testified, others state that this is not so.

M. E. Snyder (Pr. A. 57) General Superintendent of the Ocean Grove Camp Meeting Association since April 1, 1925 testified for plaintiff:

> "(Pr. A. 60) This strewing of our beach with garbage occurred quite frequently in 1926. Each year since then it has been diminishing in quantity."

Gustave Holgarson (Pr. A. 82) fisherman for 48 years, living at Seabright, also testifying for plaintiff, said:

> "(Pr. A. 84) I have seen this stuff on the beach in Seabright. I cleaned a good many tons of it off (326). That is a good many years ago. I saw some garbage this summer on the beach, but the last three years there ain't been so much garbage on the beach in Seabright."

On page 42 of the Brief, about the middle of the page, we find this statement,

> "It (garbage) depreciates the value of property and interferes with the raising of municipal revenue (R. 505)."

One witness only, Walter J. Sweeney (Pr. A. 504), the borough tax assessor of Seabright, gave the testimony upon which this sweeping statement is based. His evidence is so lacking in substance as a support for such a conclusion that we take the liberty of quoting it (Pr. A. 505):

> "On two or three occasions, I went into the home of Mr. Reiker and Mr. Sisson, (1515) and they showed me where the litter and stuff was on the beach, and said they would not let their children go down there and bathe. And I promised them that the matter would be taken care of, and it would affect the amount of the taxes on their property. I took it before the Tax Board, and they said if I was satisfied to reduce the taxes on those places, it was satisfactory to them" (and this was done).

On pages 44 and 45 of the Brief are to be found statements in support of the contention that garbage and refuse on the beaches is a "menace to life and body".

With very few exceptions, all of the citations to pages of the record given as supporting these statements refer to hearsay testimony or conclusions of the witnesses from what had been told to them, and except for such testimony in reference to cut feet from broken bottles, the substance thereof is in respect to unimportant matters.

Toward the bottom of page 44, 12 citations to pages of the record are enumerated and in only one of these was the testimony given by an individual who actually cut

his foot. Four citations near the top of page 45 are given and all relate to the conclusions of witnesses or hearsay. In respect to the reference to the bather who had sued the City of Asbury Park for cutting his knee (R. 509), there is no proof whatever that he recovered a judgment.

The statement on page 45 that "some of the bottles in the garbage are labeled poison which shall have material in them", referring to R. 106-107, the testimony shows that *only one bottle* was referred to.

Shortly below this are six references to testimony in the record about bathers who avoid garbage and refuse in the waters because of the menace to health. These also refer to the conclusions of the witnesses.

On page 46, of the plaintiff's brief, there is a reference to typhoid fever having occurred in Red Bank (R. 331). The witness actually testified "that there has been typhoid in Red Bank, plenty. At different times surely—the average amount that would happen in any community."

We have commented in our main brief (Appendix "B" thereto, pages 110-111) upon the finding of the Master (R. Sp. M., p. 16) based on the testimony of Dr. Fischer (plaintiff's brief, page 47). In all of the 50 or more miles of beach front communities affected with their hundreds of thousands of summer residents and visitors and 160,000 of all the year around population, only one doctor could be found who could testify in relation to the increases in the various affections mentioned and he only compared the records of 1928 with 1929. The number of cases mentioned even in the year 1929 as compared with the permanent population is almost grotesque as a basis for a finding. Besides the failure to elicit any such evidence from the Health Physician of Spring Lake (Pr. A. 249), Health

Inspector Bostwick of Bradley Beach gave no testimony to support such finding (Pr. A. 198).

On the bottom of page 48 of plaintiff's brief it is stated that

> "Instances appear where guests stop coming to these resorts entirely because of their disgust with the garbage condition (R. 250)."

The testimony is "*I think* I have had people stop coming there on that account".

On page 49 of the brief we find it stated that the locations of the "dumping grounds are shown on plaintiff's Exhibit 205 (R. 294-5)." The distances marked on the exhibit are somewhat less than those testified to by Supervisor Anderson and his Assistant Haas (Pr. A. 537, 637) and the Special Master has made a finding (R. Sp. M., p. 20), to which plaintiff has not excepted, that the distances of the dumping points from the shore are in accordance with their testimony and not with that of Smack and his chart. Why then should the plaintiff have referred to the matter of the chart and Smack's testimony? Can it be that the brief was written before the Master made his report?

Near the bottom of page 49 of the brief we find it stated:

> "The fact that defendant's garbage reached plaintiff's shore was constantly called to its attention without denial, during the negotiations of Governors Silzer, Moore and Larson, * * *."

This is also somewhat inaccurate. In a letter dated May 23, 1923 from Commissioner Taylor of the New York Street Cleaning Department to Mr. John Gruetzner, Superintendent of the beach at Asbury Park, read into the record at pages 507-508, we find the following:

> "A study of the tides show that they travel at the rate of 2 miles an hour for the period of 6 hours, so that the distance that any material could approach the shore at Asbury Park would be 6 miles, and then it would be caught by the outgoing tide and carried out again * * *. It seems to me that unless an accident occurs to one of our scows from collision or otherwise, there is no chance of the garbage of the City of New York reaching the beaches."

A similar statement in substance is to be found in a later letter from Commissioner Taylor to Governor Silzer dated May 29, 1924, read into the record at pages 457-458. On page 50 of the brief this statement appears:

> "On the second occasion they put bottles overboard in the garbage to test the floating but did not gather them up 'because they were floating to the Jersey shore' (R. 557)."

We ask the Court if it is not apparent from this statement that the impression is sought to be created that the defendant's witnesses Gainard, Lawrence and Bergsten when making their test threw bottles overboard and then abandoned them because they were floating to the New Jersey shore? The actual testimony (to which we may refer under the stipulation set forth at page XXIII of the Printed Abstract) is as follows (S. M. 1674):

> "Q. And you went and gathered them up again, didn't you? A. We certainly did not.
>
> Q. Didn't you go and gather any of those bottles and cans up because they were floating to the Jersey shore? A. We certainly did not.
>
> Q. Now, you did not on any of those trips go and gather up the cans or bottles because they were floating towards New Jersey shore? A. We did not."

(This reminds one of the ancient illustration of unfair cross-examination "Have you stopped beating your wife? Answer, yes, or no.")

On page 52 of the brief we find this statement as to the defendant's garbage dumped at sea:

> "It retards the development and growth of the seashore communities; depreciates the value of real property; reduces and impairs the development of commercial enterprises; and retards the general prosperity; * * *."

As set forth under subdivision "A", Point VI (pp. 81-86), of our main brief, there is no clear and convincing proof to substantiate these important contentions of the plaintiff.

At the bottom of page 52 of the brief the last subdivision is "Public Nuisance Proven". We attacked the weakness of the plaintiff's proof in Point II of our main brief on pages 55-57. We cited the testimony of seven of plaintiff's witnesses who stated in substance that for many years prior to the time when defendant started to dump garbage at sea in 1918, conditions on the beaches had been bad. Here is the testimony of three more of such witnesses on the subject.

M. Hall, a fisherman and companion of Smack's on his investigating trips, testified (Pr. A. 117):

> "For the last 20 years, I guess I have seen more or less garbage."

Albert B. Carver, another lobster fisherman, testified (Pr. A. 213):

> "I have been in that business for 17 years. * * * (Pr. A. 214). That condition (garbage) has existed ever since I can remember."

E. Donald Sterner, State Senator, who has lived at Belmar all his life testified (Pr. A. 216):

> "I have encountered this garbage on the beach or elsewhere ever since my boyhood days."

In support of the last mentioned conclusion of the plaintiff are cited a number of authorities, among others the case of *Kuehn* vs. *Milwaukee*, 92 Wisc. 263, 18 L. R. A. 553, 554-6. The L. R. A. citation is not correct. That corresponds to a citation of the same case when it reached the highest court of Wisconsin four years earlier reported in 83 Wisc. 583 (53 No. W. 912). When the case came before the Court later in 92 Wisc. 263, it was also reported in 65 No. W. 1030.

We take the liberty of quoting therefrom as an addition to the list of cases set forth at page 49 of our main brief.

It holds that the City of Milwaukee, in disposing of its garbage through a contractor (who dumped it in Lake Michigan, 15 miles from shore thereby injuring the plaintiff's fishnets) was acting in a governmental capacity, the opinion also stating:

> "And it is not necessarily nor *prima facie*, an act of nuisance to cast the garbage of a city upon Lake Michigan, 15 miles from the shore. It has long been the almost universal custom everywhere to empty the sewage of cities into adjacent lakes and streams almost from necessity."

3.

Replying to plaintiff's arguments that compliance by the defendant with 29 Stats. 209 as amended, and permits issued thereunder by the Supervisor of the Harbor of New York, does not relieve defendant from the effect of the public nuisance created by its dumping.

We have little to add to what was said in Point III in our main brief and what has already been said on the subject herein.

The cases cited by the plaintiff on page 55 relate to nuisances erected or committed within State boundaries and much that is said in them is colored by that fact.

At page 56 it is stated that the validity of the permits issued by the Supervisor of the Harbor to the defendant cannot be determined from the record herein. In reply it is sufficient to state that they were regarded as valid by the Master (R. Sp. p. 43) [even although valueless as a defense] and plaintiff has not excepted to the finding.

Plaintiff contends (p. 56) that 30 Stats. 1152 (Section 13, Title 33, Section 407 of United States Code) applies outside the Harbor of New York and adjacent waters. No authority for this claim is cited and in reason it has no validity. If 25 Stats. 209, as amended, does not apply to defendant's acts certainly 30 Stats. 1152 does not. If one is not violated neither is the other. If a permit from the Harbor Supervisor is not good, one from the Secretary of War would not be valid either.

As a matter of fact, however, 30 Stats. 1152 was originally part of a general River and Harbor Act making

appropriations for works in rivers and harbors. 25 Stats. 209 was a special act covering for New York Harbor and adjacent waters the same subject as that covered for other harbors by 30 Stats. 1152. The Master so held (R. Sp. M., p. 46).

4.

Replying to plaintiff's arguments that such garbage and refuse as reaches the plaintiff's shores from dumpings by coastwise and other vessels and other sources is negligible in comparison with that dumped by defendant and reaching plaintiff's shores, and constitutes no defense to the plaintiff's complaint.

On page 58 of plaintiff's brief it is said that defendant's three witnesses Gainard, Lawrence and Bergsten testified to the "alleged accumulation of garbage" on the decks of vessels amounting "to 50 tons accumulated in ten to fifteen days in port occupying a space of 50 cu. ft. to the ton."

It is claimed that the testimony is incredible. The characterization that testimony related to accumulations "of garbage" is inaccurate and unfair. Gainard used the general word "materials" (Pr. A. 554) and then described them in detail (Pr. A. 555). He did not state that the accumulation was for a period of ten or fifteen days, but for a week or ten days (Pr. A. 555, 560), and that "When I said they accumulate garbage, now I am talking of accumulation in port, hold cleanings" (Pr. A. 560) * * * what was left of the cargo, the dirt, the dunnage the 50 tons consists of "garbage and rubbish" (Pr. A. 561). The others testified to much the same thing (Pr. A., 584-585, 624-625), although the amount was made smaller.

It really seems rather difficult for the plaintiff's brief-writer to characterize the testimony accurately. The testimony of defendant's witnesses in regard to the kind of material dumped from cargo boats was in a measure corroborated by plaintiff's rebuttal witness, Snow (Pr. A. 647-648), except that he had not seen garbage in dunnage accumulations.

Under the head of "Sewer Pollution" plaintiff discusses evidence relating to the Long Branch and Asbury Park Sewers. We have treated this subject on pages 72-74 of our main brief. We will only add that the criticism of the system of the Long Branch Sewer Company in the Engineers' Report (Defendant's Exhibit 10) is about as scathing as could be made.

The criticisms of the engineers appear on pages 16, 31 and 33 of their report. On page 16, it is stated

> "The efficiency of this plant is very low and unsatisfactory."

On page 31, it is said:

> "The treatment in the disposal plant is by screening only of a most primitive kind."

On page 32, we find the following:

> "Fly screen wire has been found elsewhere to be unsuitable for the screening of sewage. As might be expected, large solids are found in the effluent."

On page 33, it is stated:

> "The plant has been condemned by the State authorities and a new plant ordered, consisting of septic tank, chlorine disinfection, and pumps to raise the sewage to an elevation where it will be free from tidal interference."

On page 64 of the brief, plaintiff states that "defendant produced no evidence of any such dumping," i. e., by Brooklyn Navy Yard scows. Well, Harbor Supervisor Anderson testified (Pr. A. 540):

> "Scows of the Navy Yard in New York deposit materials on the high seas. They are required to go out to the garbage limit, although the proportion of the garbage in their loads is a small proportion. Theirs is generally a rubbish and refuse proposition."

Plaintiff's investigator, Smack (Pr. A. 9) said:

> "In trailing Woodson we passed a Navy vessel towing one empty garbage scow * * *."

It is true, defendant had no eye-witness or photographer to record the dumping by Navy Yard vessels. Doubtless, it is possible to infer that the empty garbage scow being towed by a Navy vessel was simply out for an airing, and that the testimony of Captain Anderson was, unlike the conclusions of dozens of plaintiff's witnesses, which were based on "complaints," of no value whatever.

The sea lane, or course, of coastwise vessels southbound from New York ranges from three miles offshore at Seabright, Long Branch and Asbury Park to five miles at Sea Girt and to eight miles off Barnegat Lighthouse (Pr. A. 553, 584). The Master seems to have so found, and that their routes lie between the dumping places of the City and the shore (R. Sp. M. p. 31). The dumping points for "cellar dirt" barges being at 4 miles southeast of the lightship must also have been nearer the shore than the City's dumping place. Hence the retarding influence of the tides would be less upon materials dumped from these

sources than they would be on materials dumped further offshore, since only one tide would operate against those dumped nearer inshore. They also have a shorter distance to go when drifting under the influence of an east wind. In other words, the likelihood of such garbage and refuse reaching New Jersey shores and waters would be much greater.

Our contention is, not as stated by plaintiff at page 64, that a similar nuisance created by passing ships or private contractors from Brooklyn Navy Yard excuses defendant and is a valid defense. We are aware of the doctrine that if A is *proved* to have committed a nuisance upon X's property, the fact that B, C and D contribute thereto does not relieve A. Our contention relates to the difficulty of *proving* that A (the defendant herein) actually committed a nuisance which affected plaintiff's property, in view of all the other sources from which the offending substances are more likely to have come, and which affected it for years when defendant was not dumping its garbage into the ocean.

5.

Replying to plaintiff's contentions in regard to some particular exceptions to the Master's report.

The only thing on which we wish to comment is the statement on page 66 of the brief relating to defendant's contention that the plaintiff must be held to strict proof, plaintiff remarking that the defendant has not the status or sovereignty of a State. We do not contend that the defendant has *all* of the sovereign powers or prerogatives of a State, but we have argued in support of our contention

that it has many of them (see pp. 48-50 of our Main Brief and cases cited therein).

To the cases cited in our Main Brief, we would add:

United States v. *Railroad Co.*, 17 Wallace, 322;
Commonwealth v. *Cutter*, 156 Mass., 52;
Higginson v. *Treasurer of Boston*, 212 Mass., 583.

In the headnote to *United States* v. *Railroad Co.* (*supra*), it is said:

> "A municipal corporation (City of Baltimore) is a portion of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenue."

In *Higginson* v. *Treasurer of Boston* (*supra*), it is said, at page 585:

> "They (Cities and towns as territorial subdivisions of the State) have a two-fold character, one governmental, the other private. In the one they execute the functions and possess the attributes of sovereignty which have been delegated by the legislative department of the government * * *."

Other contentions of the plaintiff need not be specifically replied to here except that *costs* should not be awarded to the plaintiff, but to the defendant, on dismissal of the complaint as prayed for by defendant. Our views in regard to the remaining subjects argued by the plaintiff are sufficiently set forth in our main brief.

As an appendix to this brief, we have set forth a list of the exceptions to the Master's findings and page numbers where the reasons for taking the exceptions are discussed in our main brief.

Conclusion.

We renew our prayer for action by this Court set forth at the end of our main brief.

Respectfully submitted,

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New York, April 27th, 1931.

Appendix.

List of Defendant's Exceptions and places in Main Brief where discussed.

Exceptions Nos.	Discussed in brief at pages	Exceptions Nos.	Discussed in brief at pages
1	24	27	105
1a	25	28	105
2	28	29	105-6
3	25	30	105-6
4	102	31	105-6
5	102	32	No specifie argument
6	(Error; found by Master)	33	46, 47, 86
7	25	34	67
8	25	35	105-6
9	103	36	105, 107
10	103	37	105, 107
11	25	38	105, 108
12	103-4	39	105, 108
13	103-4	40	79-80
14	61	41	46, 47
15	52	42	46, 47
16	110-11	43	46, 47
17	110-11	44	108
18	46	45	108-09
19	46	46	27, 36, 69
20	46	47	No specific argument
21	46-47	48	109
22	46-47	49	68
23	46-47	50	68
24	63	51	70-71
25	104	52	74
26	104-5	53	109

Exceptions Nos.	Discussed in brief at pages
54	111
55	74
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61	70-71
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74	79-80
75	79-80
76	79-80
77	79-80
78	79-80
79	79-80
80	91
81	91
82	73
83	109-110
84	80
85	80
86	80
87	No specific argument; partly found by Master.
88	80
89	80
90	No specific argument.
91	93
92	93
93	93
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